1978

State of Utah v. Chris Dean Bender : Brief of Appellant

Utah Supreme Court

Christine Fitzgerald; Attorney for AppellantRobert B. Hansen; Attorney for Plaintiff-Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,	:	
-v-	:	
CHRIS DEAN BENDER, Defendant-Appellant.	:	Case No. 15413

BRIEF OF APPELLANT

Appeal from the judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is a criminal proceeding in which the appellant, CHRIS DEAN BENDER, was charged with the crime of Theft in the Third Degree in violation of Utah Code Annotated, Section 76-6-403 (1953 as amended).

DISPOSITION IN THE LOWER COURT

Appellant was tried by a jury on March 3, 1977, before the Honorable James S. Sawaya, and found guilty of Theft in the Third Degree. Appellant was sentenced to an indeterminate term as provided by law and placed on probation. As terms of that probation, the appellant is required to reside at the Community Correction Center (Halfway House) until released by that facility.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction and judgment

rendered below and a remand of the case to the Third Judicial Di
Court for a new trial, or in the alternative, the appellant seek
reversal of the judgment rendered below and a remand of the case
the Third Judicial District Court with the instructions to enter
judgment for the lesser included offense of Attempted Theft and
impose the appropriate modifications in the sentence.

STATEMENT OF THE FACTS

Francis Hayes, an employee of Chalk Garden, a woman's clothing store located in Salt Lake City, testified that on Dece 21, 1976, she had just arrived at work when she first noticed th appellant in one of the Chalk Garden's dressing rooms (T. 3). A time, according to Ms. Hayes, the appellant " . . . was putting thing in a big paper bag" (T. 5, line 7). On cross-examination, clarified that the article, a coat, was actually halfway in and h out of the bag when she observed the appellant (T. 13). Ms. Haye had noticed the appellant because the dressing room door was open usually it is kept closed (T. 7). In fact, she testified that if door had been closed, she would have not been suspicious (T. 10).

After contacting John Bernard, the owner and manager o Chalk Garden, concerning the appellant, Ms. Hayes returned to the dressing room and found a wooden hanger, normally used for the mo expensive merchandise (T. 7). However, she did not check for pos removed price tags in the room nor did she check the rack where coat had been located for additional hangers (T. 15). There was evidence presented which specifically connected the hanger with coat. Additionally, Ms. Hayes testified that she did not know wh

the coat had been previous to her observation, what had previously been in the dressing room, nor when the appellant had arrived at the store (T. 9, T. 13).

John Bernard, upon being contacted by Ms. Hayes, followed the appellant from the dressing room to the front counter and register area. Mr. Bernard testified:

> . . . there were a couple of sales people behind the counter and more than one person at the counter purchasing something at the time. He [the appellant] stopped and spoke with someone at the counter . . . I could not hear what they were saying. I have no idea what was mentioned. They did speak to each other, and then he turned and walked down here past the end of the counter the end of this counter, towards the front door. At this point I asked him if I could see what he had in the paper sack (T. 20, lines 1 - 3, 8 - 12). . . . There was no disagreement in any way (T. 21).

Mr. Bernard then opened the sack, a ZCMI bag, and removed the coat (T. 22). He identified the coat as belonging to the Chalk Garden.

On cross-examination, Mr. Bernard admitted that the "conversation" he said the appellant engaged in at the counter only amounted to his hearing the appellant say something to someone without hearing or knowing whether any reply was made (T. 29). Additionally, Mr. Bernard stated that he stopped the appellant ten to twelve feet from the exit while still near the counter area (T. 34).

Mr. Bender, the appellant, took the stand in his own behalf, and testified that he had been resting on a bench in the Chalk Garden when he noticed an unknown woman leave the ZCMI bag in the dressing room (T. 53 - 54). He opened the sack, partially took out the coat, replaced it, and proceeded to the counter area (T. 54 - 55). At the counter, he attempted to inform a person he thought was an employee about the coat. No response was made (T. 55). Mr. Bender was then stopped by Mr. Bernard.

The State witnesses agreed that at all times the appe was cooperative, never attempting to leave the store when stoppe nor hostile in giving the bag to Mr. Bernard for inspection (T. 34).

The only major factual dispute in the evidence presen concerned statements which Mr. Bernard alleged the appellant made him at the time the appellant was detained (T. 22 - 23). The ap denied these statements (T. 56). Mr. Bernard admitted that he ha concluded the appellant was guilty of theft at the time of the st and that no statements or explanations of the appellant would ha made a difference to him (T. 45).

POINT I

THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S PROFFERED JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF ATTEMPTED THEFT.

Appellant was entitled to an instruction on Attempted Theft as a lesser included offense to the charge of Theft. At th trial, the appellant requested the instruction on the lesser incl offense [1] and made a timely exception to its exclusion (T. 67).

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1. The appellant's requested instruction stated:

> In the event that you have a reasonable doubt as to Mr Bender's guilt as to the crime of theft, you may then consid whether or not Mr. Bender is guilty of attempted theft. Befo you would be warranted in convicting Mr. Bender of attempted theft, the State must prove each and every one of the follow essential elements of that crime:
>
> 1. That on or about December 21, 1976, the said CHRIS DEAN BENDER did attempt to obtain or exercise unauthorized co over the property of the Chalk Garden.
>
> 2. That he attempted to obtain the property with the purpose to deprive the said Chalk Garden of said property.
>
> 3. That said property had a value in excess of $250.

The importance of instructions on the lesser included offenses was noted in State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937). The Court stated that the trial court's failure to instruct on lesser offenses " . . . clashes with two fundamental rules of trial in criminal cases: It has the effect of the court weighing the evidence and, in effect, limiting the jury to a consideration of only part of the evidence . . .; and it, in effect, casts upon the defendant the burden of proving his innocence or justification." Id. at 1132.

Utah Code Annotated §77-33-6 (1953 as amended) imposes the obligation to give the instruction on the lesser included offense, providing:

> The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of any attempt to commit the offense.

This section recently was interpreted by the Utah Supreme Court in State v. Pierre, Supreme Court No. 13903, November 25, 1977, where the Court held the statute was subject to the modification of

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less than $1,000.00 lawful money of the United States.

4. That such acts occurred in Salt Lake County, State of Utah.

Mr. Bender's plea of not guilty thereby casts upon the State the burden of proving beyond a reasonable doubt each and all of the foregoing essential elements. Thus, before you can convict Mr. Bender of the crime of attempted theft, you must find from the evidence, beyond a reasonable doubt, each and every one of the foregoing elements. If you find that the evidence has failed to prove any one or more of these essential elements to your satisfaction beyond a reasonable doubt, then it is your duty to acquit Mr. Bender.

Utah Code Annotated, Section 76-1-402 (4) (1953 as amended), whi states:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the excluded offense.

In State v. Dougherty, 550 P.2d 175 (1976), the Utah S Court defined the situations where instructions on lesser include offenses are requested and when such instructions must be given a matter of law. Citing Lisby v. State, 414 P.2d 592 (Nev., 1966), Court stated:

> First, where there is evidence which would absolve the defendant from guilt of a greater offense, or degree; the instruction is mandatory.
>
> Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for an intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.
>
> Third, is an intermediate situation. One where the elements of the greater offense include all the elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser offense. In such a situation instructions on the lesser offense may be given, because all elements of the lesser offense have been proved. However, such an instruction may properly be refused if the prosecution has met its burden of proof on the greater offense, and there is no evidence tending to reduce the greater offense. The court concluded by stating that if there be any evidence, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lesser included offense, the court must, if requested, give an appropriate instruction. [550 P.2d at 176]

The question is whether there is a rational basis upon which a lesser included offense could have been submitted to the jury. In the instant case, John Bernard testified that he stopped the appellant while the appellant was in the store (T.21) and that the appellant offered no resistance to Mr. Bernard's inquiries and requests (T.33-34). Further, the appellant voluntarily waited for Mr. Bernard when Bernard left the store to locate a security guard. Because the appellant never left the store with the merchandise, appellant believes the case at bar is within the first situation discussed by the Court in Dougherty, supra, and therefore, entitled him to the instruction on the lesser offense as a matter of law. Appellant submits that the second Dougherty situation is inapplicable notwithstanding his denial of complicity in the crime of theft because appellant admitted his presence in the store and his possession of the package. The second Dougherty situation is most reasonably read as encompassing those situations wherein a defendant denies his presence at the scene of the crime or presents an alibi defense. Where the evidence of appellant's conduct could be interpreted as exonerating him of the crime of theft, there is a rational basis for instructing the jury on the lesser included offense of attempted theft. Alternatively, appellant's case falls within the intermediate situation of Dougherty and the State failed to meet its burden of proof, entitling the appellant to his requested instruction. Both the appellant's testimony concerning his possession of the package and the evidence that he

never left the store with the merchandise would tend to reduce the greater offense of theft.

Appellant submits that the instant case is soundly within the purview of Sections 77-33-6 and 76-1-402(4) as interpreted by the Court and that it was prejudicial error to omit the instruction to the jury on the lesser included offense. The effect of the Court's failure to instruct the jury on the lesser included offense was to contravene the jury's duty to consider other verdicts which they might deem more appropriate in the circumstances.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON REASONABLE ALTERNATIVE HYPOTHESIS

At the trial, the appellant submitted a proposed jury instruction on reasonable alternative hypothesis.[2] The trial court refused to so instruct the jury and the appellant made a timely exception to the exclusion (T.67).

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2. The appellant's proposed instruction stated:

To warrant you in convicting the defendant of the crime charged in the complaint, the evidence must, to your minds exclude every reasonable hypothesis other than the guilt of the defendant that is to say, if after a full and fair consideration and comparison of all the testimony in the case you can reasonably explain the facts in evidence on any other reasonable ground other than the guilt of Mr. Bender, then you must acquit him.

The policy behind the reasonable alternative instruction to protect the rights of the accused and to emphasize to the jury that they must be convinced beyond a reasonable doubt, based on the evidence presented, that the defendant is guilty of the offense charged was stated by the Court in State v. Garcia, 11 Utah 2d 67, 355 P.2d 57 (1960). In Garcia and more recently in State v. Fort, Supreme Court No. 15197, December 22, 1977, the Court has held this instruction proper only in cases where a necessary element of guilt consists of circumstantial evidence. See also State v. Dumas, 554 P.2d 1313 (Utah 1976).

The appellant testified at the trial that he observed a woman leave a package in the dressing room when she left the room while he was sitting on a bench in the store (T.53-54). He went to the dressing room to retrieve the package and proceeded to the front of the store to stop the woman or turn in the package at the time he was stopped by the manager (T.54-55). The prosecution's evidence substantiates the appellant's version of his actions. The salesgirl testified to observing the appellant in the dressing room when she first came on duty (T.6). Mr. Bernard testified to following the appellant to the front of the store and seeing him speaking to someone at the checkout counter (T.19-20). At no time did Mr. Bernard nor the security officer attempt to elicit an explanation from the appellant.

Because the State presented no evidence which overtly reflected on the appellant's intent, the evidence is subject to alternative conclusions, one resulting in a finding of innocence

and the other in guilt. In this circumstance, an instruction or reasonable alternative hypothesis which accentuates the State's burden of proof beyond a reasonable doubt is appropriate and necessary to insure the appellant's right to justice and fairness.

POINT III

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF THEFT

Utah Code Ann. §76-6-404 (1953 as amended) provides:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Implicit in the State's burden of proof is the requirement to prove beyond a reasonable doubt that the appellant had the intent to take the owner's property and deprive him of it. State v. Kazda, 545 P.2d 190 (Utah, 1976), State v. Romero, 554 P.2d 216 (Utah, 1976). In Romero, supra, a prosecution for burglary and theft, the Court stated, "The culpable mental state required for [theft] is defined as a conscious objective or desire to engage in the conduct or cause the result", citing Utah Code Ann. §76-2-103 (1975 Pocket Supplement). The Court went on to state:

> This Court has long upheld the standard that in an appeal from conviction the court cannot weigh the evidence nor say what quantum is necessary to establish a fact beyond a reasonable doubt so long as the evidence given is substantial [554 P.2d at 218].

The State's evidence in the instant case fails to meet the substantial level delineated by the Court.

The principal deficiency of the evidence is that the salesgirl testified that she had just arrived at the store when

observed the appellant in the dressing room and that no evidence was presented which proved or even suggested that the appellant took possession of the coat prior to its placement in the ZCMI bag. Additionally, the appellant was stopped by the manager when he was ten to twelve feet away from the exit and the appellant offered no resistance to the manager's inquiries. The evidence does not suggest that the appellant sought to conceal the package taken from the dressing room. In both respects, the case at bar is distinguishable from the facts in State v. Doherty, 29 Utah 2d 320, 509 P.2d 351 (1973). The defendant in Doherty was charged with stealing a gun from a store and the Court held there was a sufficient showing of asportation of the gun without evidence showing that the defendant carried it beyond the check stand and from the premises. However, in that case the defendant was observed near the gun case; a store employee heard the gun case open and saw the defendant's companion put a pistol in his pocket and leave the store; and the defendant removed a pistol from his pocket and placed it on the counter when approached by a store employee.

Unlike Doherty, the instant case is lacking in evidence, direct or circumstantial, to prove the appellant's conscious objective to commit the offense or to prove that he completed the offense. The evidence, at best, is sufficient to show the lesser included offense of attempted theft and fails to prove a prima facie case of theft. Consequently, the Court must reverse the judgment of theft.

CONCLUSION

The trial court committed prejudicial error in refusi to instruct the jury on the lesser included offense and reasonab alternative hypothesis. The evidence of both parties presented rational basis for the inclusion of the instructions and the failure to so instruct diminished the normal judicial insurance that the verdict be based on a finding of proof beyond a reasonal doubt of the offense charged. Further, the State failed to pres a prima facie case of theft by proof of all of the elements and the conviction must be reversed for insufficient evidence to support the verdict. For the foregoing reasons, the appellant is entitled to a new trial. In the alternative, the Court may remand the case to the District Court with the instruction to ent a judgment for the lesser included offense of attempted theft and to impose a new sentence thereon.

DATED this ____ day of January, 1978.

Respectfully submitted,

CHRISTINE FITZGERALD
Attorney for Appellant